Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-974

PEABODY COAL COMPANY,
Petitioner,

v.

LOCAL UNION NOS. 1734, 1508 and 1548, and DISTRICT NO. 23,
UNITED MINE WORKERS OF AMERICA,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals**
**for the Sixth Circuit**

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutory Provisions Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 13 |
| 1. The decision below conflicts with the decisions of other Courts of Appeals as to the liability of local unions for the mass action of their members in actions arising under 29 U.S.C. 185 | 13 |
| 2. The decision of the court below that a union may only be held responsible for the authorized or ratified actions of its officers and agents conflicts with a decision of the United States Supreme Court and decisions of other Courts of Appeal as to the proper interpretation of 29 U.S.C. 185, which hold that liability of a union is based on ordinary doctrines of agency | 18 |
| 3. The decision of the Court below is in conflict with other Federal Courts of Appeals in that it did not require affirmative action on the part of the local unions to end the strike | 22 |
| Conclusion | 24 |
| Appendix A | A-1 |
| Appendix B | A-7 |

## Table of Cases

Eazor Express, Inc. v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 520 F.2d 951 (3rd Cir. 1975), cert. denied 424 U.S. 833 (1976) ..... 13, 16, 20, 22

Foam and Plastics Division Tenneco Chemicals, Inc. v. General Drivers and Helpers, Local 401, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 520 F.2d 945 (3rd Cir. 1975) . 13

North American Coal Corporation v. Local Union 2262, United Mine Workers of America, et al., 497 F.2d 459 (6th Cir. 1974) ..... 13, 14, 15

Peabody Coal Company v. Local Union Nos. 1734, et al., 543 F.2d 10 (6th Cir. 1976) ..... 14, 19, 22

Peabody Coal Company v. Local Union Nos. 1734, et al., 484 F.2d 78 (6th Cir. 1973) ..... 11

United Construction Workers v. Haislip, 223 F.2d 872 (4th Cir. 1955) ..... 15

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966) ..... 19, 21

United States Steel Corporation v. International Union, United Mine Workers of America, et al., 534 F.2d 1063 (3rd Cir. 1976) ..... 19, 20

United States Steel Corporation v. United Mine Workers of America, et al., 534 F.2d 1063 (3rd Cir. 1976) ..... 13, 16, 17, 22, 23

Vulcan Materials Company v. United Steelworkers of America, et al., 430 F.2d 446 (5th Cir. 1970), cert. denied 401 U.S. 963 (1971) ..... 13, 17, 18, 20, 22

Wagner Electric Corporation v. Local 1104, International Union of Electrical, Radio and Machine Workers, 496 F.2d 954 (8th Cir. 1974) ..... 13, 17, 20, 21, 22, 23



## Statutes Cited

28 U.S.C. 1254 (1) ..... 2

29 U.S.C. 106 ..... 4, 19, 21

29 U.S.C. 185 ..... 3, 5, 13, 17, 18, 19, 20

29 U.S.C. 185 (e) ..... 19, 20

29 U.S.C. 187 ..... 17, 19

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**To the United States Court of Appeals**
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Peabody Coal Company (hereinafter referred to as ("Peabody") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 19, 1976.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported in 543 F.2d 10, and appears in Appendix A hereto. The opinion of the District Court, which is not reported, appears in Appendix B hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 19, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the mass action of the membership of a Local Union in failing to return to work after service of a temporary restraining order constitutes civil contempt, where at Local Union meetings the members discuss the dispute and are informed of the order enjoining them from striking over it and ordering them to submit the matter to arbitration.

2. Whether under ordinary doctrines of agency, a Local Union is in civil contempt where after service of a temporary restraining order enjoining it from striking over an arbitrable dispute the agents of the Local Union, at Local Union meetings, discuss the merits of the dispute, inform the members of the order and request them to obey it, but the Local Union and its agents continued to strike.

3. Whether after issuance and service of a temporary restraining order enjoining a Local Union from striking over an arbitrable dispute, the Local Union agents and officers must take affirmative action to end the strike to relieve the Local Union of civil contempt.



## STATUTORY PROVISIONS INVOLVED

29 U.S.C. 185 provides as follows:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer

or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

29 U.S.C. 106 provides as follows:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof."

## STATEMENT OF THE CASE

Petitioner, Peabody Coal Company ("Peabody") operates underground and surface coal mines in Western Kentucky (A 10, 42, 63, 159, 297-298, 300).[1]

On November 12, 1971, plaintiff entered into the National Bituminous Coal Wage Agreement of 1971 ("National Contract") with International Union, United Mine Workers of America and Respondents, Local Union No's. 1734, 1508, 1548 and District 23 are parties thereto (A 10, 42, 62-63, 65-98).

[1] "A" refers to the Joint Appendix submitted by the parties in the court below.



Petitioner instituted this action to enjoin a strike and work stoppage by Local No's. 1734, 1508 and 1548 and District 23 in violation of the compulsory grievance procedure of the National Contract, which provides for final and binding arbitration (A 92-93).

The National Contract provides in part:

"The United Mine Workers of America * * * agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' article of this agreement * * *" (A 95)

The United States District Court for the Western District of Kentucky had jurisdiction of the case pursuant to 29 U.S.C. 185.

Star Underground Mine is represented by Local Union No. 1734. Ken Underground Mine is represented by Local Union No. 1548 and River Queen Underground Mine is represented by Local Union No. 1508. All three of the Local Unions are in District 23, which covers Western Kentucky (A 62-64, 306). All of them are unincorporated labor organizations chartered by International Union, United Mine Workers of America (A 10, 42).

District 23 processes grievances for local unions commencing at the third step of the Settlement of Disputes Procedure ("Grievance Procedure") of the National Contract (A 92, 93, 319-320).

As a result of a series of disputes over the inspection of conveyor belts which carry coal out of the mine (A 241, 531) strikes and work stoppages occurred at Star, Ken and River Queen Underground Mines (A 231, 241, 245-246, 261-262, 531).

The dispute concerned qualifications of persons who examined the belts (Belt Walkers). The Union wanted Peabody

to have people with First Class Miners Certificates walk the belts. Mine foremen, Examiners and Fire Bosses have First Class Miners Certificates. The State of Kentucky certified Belt Walkers to inspect the belts and on June 1, 1972 the United States Bureau of Mines approved the people certified by the State of Kentucky. Prior to that date it had required people with First Class Miners papers to inspect the belts (A 195-198).

On May 13, 1972, a grievance was filed at Star Underground Mine (A 241-242). It claimed that bosses were inspecting the belts; that this was not "boss' work" and that there were Union people with First Class Miners Papers who would bid jobs to walk the belts if they were posted. By May 20, 1972, the grievance had reached the third step of the Grievance Procedure (A 244, 531).

The parties agreed to hold the grievance in abeyance until the Federal Bureau of Mines and State of Kentucky made a decision as to the qualifications for Belt Examiners and Peabody agreed that until the decision was made that union men with First Class Papers would walk the belts (A 244-245, 531).

On June 1, between 6:15 a.m. and 6:30 a.m., J. T. Lyle, a member of the Mine Committee, demanded that jobs for Belt Examiners be posted at Star Underground Mine and said that if Peabody did not post the jobs, the men would not work. The jobs were not posted and at 7:00 a.m. on June 1, 1972, a strike and work stoppage commenced at Star Underground Mine (A 241-245).

Under the National Contract, a Mine Committee of three miners is elected by the employees at the mine. The Committee's duty is to handle the adjustment of disputes arising pursuant to the National Contract that mine management and the employee or employees have failed to adjust (A 92).

At Ken Underground Mine, a grievance was filed on April 25, 1972, in which Belt Walkers asserted that they should be



paid the Fire Boss rate of pay because they were performing the duties of that classification (A 225).

At the third step of the Grievance Procedure, the parties agreed to hold the matter in abeyance until the State and Federal authorities agreed to the required qualifications of Belt Walkers (A 227).

On June 1, 1972, Peabody had a meeting with the Mine Committee. At that time, the Mine Committee asked the Mine Superintendent of Ken Underground Mine if he was going to post jobs for Belt Walkers (A 230-231).

The Superintendent replied that there was an agreement to see what the State and Federal people came up with before posting the jobs. The Mine Committee said you know what happened at Star and if the jobs were not posted, "that they didn't know how long they would keep these people out—" (A 231-232). A strike commenced at Ken Underground Mine on the 7:00 a.m. shift on June 2, 1972 (A 63, 532).

On June 3, 1972, at 3:00 p.m., a strike began at River Queen Underground Mine (A 63). At the time, a formal grievance had not been filed at that mine (A 474). However, the President and a Mine Committeeman of Local 1548 told the superintendent of River Queen Underground Mine that the men had gone home; that some of the miners had asked when they were going to have a called meeting; that they told the miners that they were not going to have a called meeting (A 261-262) and "that the District had taken * * * called the shots up to now, they'd just let them continue" (A 262, 273, 532).

On June 2, 1972, a meeting between Peabody's representatives, District 23 officers and the officers of Star Underground Mine was held (A 62, 275). In that meeting the parties sought to reach agreement for ending the strike. Mr. LeRoy Patterson, President of the District, (A 63) said he thought he could get the

men back to work if Peabody would put First Class Certified Miners on the belts (A 277, 289).

Peabody refused such offer because the Federal Bureau of Mines had approved the State of Kentucky certification for Belt Examiners, and said that if the Union wanted to go ahead with the Grievance Procedure, it was willing to do so, but that it would not let the union make the determination as to which persons were to walk the belts (A 277-278).

Patterson said that the Star Underground Mine Local was having a meeting and that he would present the matter to them and see what happened (A 278, 315).

At each of the mines involved in this matter, coal was produced on two shifts. The third shift was a maintenance shift and Belt Walkers did not work thereon (A 229, 241, 260). However, when the strike started, all three shifts stopped work (A 241, 229, 260).

By June 5, 1972, none of the men had returned to work and Peabody filed suit for injunctive relief (A 224, 245, 260).

On June 6, 1976, a temporary restraining order was issued. It required the District and the three Local Unions to show cause on June 14, 1972 why a preliminary injunction should not be issued (A 28-31).

At the time of the issuance of the temporary restraining order, LeRoy Patterson, President of District 23, and Rudy Thomas, an attorney for Respondents, were present in court (A 64).

Service of the temporary restraining order was had on LeRoy Patterson, President of District 23 and on the President and a member of the Mine Committee of each of the three Local Unions on June 7, 1972 (A 2, 63-64),

Such temporary restraining order provided:



"1. The defendants, and each of them, shall submit their disputes and disagreements referred to in the complaint to the grievance procedure and arbitrate the said dispute * * *, and

"2. The defendants, and each of them, and their respective members, officers, agents, servants, and employees, and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are enjoined and restrained from:

"(a) Engaging in strikes, work stoppages, or concerted refusals to work at plaintiff's Star, Ken, and River Queen Underground Mines, or from failing or refusing to perform their work or services in a regular and normal manner for plaintiff, over the disputes between the plaintiff and each of the defendants involving job classifications, certifications, and applicable contract rates of pay for persons who inspect and examine coal-conveying belts (being the same matters which defendant Locals 1734 and 1548 followed to the third step grievance procedure before engaging in the aforesaid walkout);

"(b) Violating or continuing to violate the contract by refusing to submit to the grievance procedure stated in the contract the dispute of each of the defendants regarding the aforementioned matter which at the Star and Ken Underground Mines are already in the third step of the grievance procedure; and

"(c) Inducing, instructing, persuading, or encouraging plaintiff's employees at plaintiff's Star, Ken and River Queen Underground Mines to engage in a strike, work stoppage or other economic activity against plaintiff or to fail or refuse to perform their work or services in a regular or normal manner for plaintiff." (A 28-30)

On June 7, 1972, Peabody met with Patterson, the Presidents of each of the Local Unions, a majority of the Pit Committee (Mine Committee) for each of the Locals, other District officers and a Washington representative of the United Mine Workers (A 279).

The parties discussed the relative merits of the Belt Examiner dispute. Peabody said it was going to use state certified Belt Examiners, which procedure had been approved by the Federal Bureau of Mines (A 280-281). The Unions insisted on putting people with First Class Miners Certificates on the job of walking the belts (A 280-281).

During the course of that meeting, LeRoy Patterson said that the men would return to work if Peabody would put certified men or union certified men on the belts, and the negotiations broke down because of Patterson's demand (A 289, 290, 296-297).

According to Patterson, he had a meeting with the Local Unions on a number of occasions; that some of the meetings took place after issuance of the temporary restraining order (A 316-319); that in those meetings, he explained Peabody's position to the miners; that he told them that the company was willing to put people on the belts who were certified by the State and that it would have company people follow up and do spot checking, and that the men asked questions with respect thereto (A 317). He said that by law and the order of the court, they had to return to work; that the Local Union officers were standing beside him, and that they asked the men to return to work, but that the men did not return (A 318, 344, 351, 354).

On June 14, 1972, a hearing was scheduled on Peabody's motion to punish the District and Local Unions for contempt (A 2, 45-57).



The court did not hear any evidence. It fined District 23, $5,000.00 to June 14, 1972, and $1,000.00 a day commencing June 15, 1972 and each Local Union was fined $2,500.00 to June 14, 1972 and $500.00 a day commencing June 15, 1972 (A 59-60).

On the same day, the parties stipulated that the temporary restraining order was providently granted and should remain in force and effect (A 61).

On June 16, 1972, the pattern of strikes spread to all of Peabody's strip mines in District 23 as a result of pickets from defendant locals appearing at Peabody's surface Mines (A 258, 300, 487, 533).

On June 20, 1972, the strike was still continuing and a hearing on motion for preliminary injunction was held (A 3, 164). At the conclusion of that hearing, a preliminary injunction was granted (A 3, 492-496).

Respondents appealed from the order assessing fines for contempt. The Sixth Circuit reversed on the ground that the union was denied an evidentiary hearing and remanded the case to the District Court for further proceedings. *Peabody Coal Company v. Local Union Nos. 1734, et al.*, 484 F.2d 78 (6th Cir. 1973).

After remand the parties agreed that the entire transcript of evidence taken at the hearing on the preliminary injunction on June 20 and June 21, 1972 "be considered by the Court as if offered by the respective parties on this matter of reconsideration of whether the Union should be held in contempt and a civil contempt fine levied" (A 526). Although Respondents were given an opportunity to offer additional proof, they elected not to do so and in view of that fact Petitioner saw no need to offer additional proof (A 527-529).

On May 16, 1975, the District Court entered civil contempt fines to be paid to the plaintiff as compensation in the sum of $13,000.00 against District 23 and $6,500.00 against each Local (A 530-537).

Respondents appealed to the Court of Appeals for the Sixth Circuit (A 8).

The Court of Appeals affirmed as to District 23, because it failed to submit the dispute to arbitration as required by the temporary restraining order. However, it set aside the civil contempt fines with respect to the three Local Unions on the ground that a union may only be held responsible for the authorized or ratified actions of its officers and members. It rejected Petitioner's arguments that the Local Unions were in violation of the temporary restraining order because the "mass action" of union members is in and of itself sufficient to bind the union, and further held that the wording of the temporary restraining order in this regard was prohibitory in nature. Therefore, the court declined to infer a requirement that the unions use their best efforts to comply with the Court's order.



## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Liability of Local Unions for the Mass Action of Their Members in Actions Arising Under 29 U.S.C. 185.

The decision below is in direct conflict with decisions of the Third, Fifth and Eighth Circuits and with a prior decision of the Sixth Circuit. *United States Steel Corporation v. United Mine Workers of America, et al.*, 534 F.2d 1063 (3rd Cir. 1976); *Eazor Express, Inc. v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.*, 520 F.2d 951 (3rd Cir. 1975), cert. denied 424 U.S. 935 (1976); *Foam and Plastics Division Tenneco Chemicals, Inc. v. General Drivers and Helpers Local Union 401, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 520 F.2d 945 (3rd Cir. 1975); *Vulcan Materials Company v. United Steel Workers of America, et al.*, 430 F.2d 446 (5th Cir. 1970), cert. denied 401 U.S. 963 (1971); *Wagner Electric Corporation v. Local 1104, International Union of Electrical, Radio and Machine Workers*, 496 F.2d 954 (8th Cir. 1974), and *North American Coal Corporation v. Local Union 2262, United Mine Workers of America, et al.*, 497 F.2d 459 (6th Cir. 1974).

In holding the Local Unions in contempt, the District Court pointed out that even though the purpose of the remand by the Court of Appeals of the original civil contempt fines was to give Respondents a due process hearing, they did not offer any additional evidence on that issue (A 533). The District Court found that District 23 and the Locals were functioning in the matter long before the strike began and continued through the period of contempt; that the District President and counsel for the Unions were in the courtroom when the temporary re-

straining order was signed; that the Unions never sought to dissolve or modify the temporary restraining order; that the strikes continued after it was issued and that Respondents did nothing to purge themselves of contempt. It then found that a union that is functioning, asserting its right and power to act as a bargaining agent, must be held liable for the mass action of its members (A 535).

The Court of Appeals ruled that the mass action theory was not in accord with the law of "this Circuit", and that a union may only be held responsible for the authorized or ratified acts of its officers and agents.

It said:

> "There is no precedent in this circuit to support the contention that the 'mass action' of union members is, in and of itself, sufficient to bind the Union." (543 F.2d 12)

Such statement by the court was erroneous in that in *North American Coal Corporation, supra,* the same court applied the mass action theory as a basis for justifying the remand of a case to determine if a local union should be held for civil contempt. In that case, criminal contempt proceedings were brought against the union and its officers.

The Court of Appeals held that the preliminary injunction was invalid, but that the officers and union were bound to obey it until it was set aside. Because the District Court did not hear evidence before holding the local union in criminal contempt, the court remanded the matter for a retrial. In such connection it said:

> "Clearly there was a strike which did continue after issuance of the injunction. The strike was the subject of discussion at local union meetings. There was effective support for the strike voiced at one such meeting. Whether



> such actions and sentiments can properly be attributed to the local union so as to prove guilt beyond reasonable doubt, should be the subject of testimony and findings on remand of the local union contempt charge." (497 F.2d 467).

In other words, the Court of Appeals held that a local union could be held in criminal contempt for the mass action of its members where after issuance of an injunction, the strike was a subject of discussion at local union meetings and the local union supported it. Such decision is the same as the mass action theory as applied by the Third, Fifth and Eighth Circuits.

Although in *United Construction Workers v. Haislip,* 223 F.2d 872 (4th Cir. 1955), cert. denied 350 U.S. 847 (1955), the local union was not a party to the case, the Court of Appeals pointed out that the local union was liable because the strike, although informally commenced, had its approval (223 F.2d 877).

The cases relied on by the Court of Appeals for the Sixth Circuit on which it relied to relieve the Local Unions of liability in the instant case did not involve local unions, but were against International Unions. Accordingly, those cases did not have occasion to consider the distinction between local unions and International Union liability based on mass action and the court's rejection of the mass action theory conflicts with the decisions in other Circuits.

In the instant case, meetings were held with the Local Unions, the membership was informed of Peabody's position and the merits of the dispute were discussed. Even though the District President and the officers of the Local Unions asked the men to return to work the officers of the Local Unions did not show leadership or purge themselves of contempt by returning to work. Instead they elected to disobey the court's order (A 316-

319, 344, 351, 354). The membership acted as the Union when it failed to return to work, and the mass action theory is applicable. Accordingly, the decision is in conflict with the decisions of the Third, Fifth and Eighth Circuits.

The mass action theory was explained in *Eazor Express* as follows:

> "* * * When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." (520 F.2d at 963).

The Third Circuit's subsequent decision in *United States Steel, supra,* provides an excellent illustration of the rule. In that case the court held that a preliminary injunction to prevent future strikes was appropriate based on the mass action theory. It pointed out that mass action is based on the concerted activities of the members of the local. It said:

> "* * * [U]nion liability under this theory is imputed from the concerted activity of the membership. Consistent with theory, however, the liability must be limited to the entity whose membership acts in concert. In most cases, as here, the entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity—the District or International Union for example—only the local can be held liable under the mass action theory. * * *" (534 F.2d at 1073-74.)

In *United States Steel,* a majority of the court held that the mass action theory creates a rebuttable inference that the union



is liable for the work stoppage. Such inference may be rebutted by showing that the local union officials employed all reasonable efforts to end the work stoppage or to dissuade the membership from engaging therein. The concurring opinion would use the mass action theory to impose strict liability on the union from the strike's inception.

Under either analysis of *United States Steel, supra,* Local No's. 1734, 1548 and 1508 must be held liable in civil contempt.

As we shall hereinafter demonstrate, the statements by the District President and Local Union officers that the men should return to work are not sufficient to rebut the mass action theory, particularly where the Local Union officers did not return to work.

In *Wagner Electric, supra,* the court held a local union responsible on the mass action theory, despite the union's contention that the strike was a wildcat because no strike vote was taken, and the local union had issued a press release disavowing responsibility or support for the strike. In rejecting these contentions, the court said:

> "However, neither of these facts compel a finding that the union was not responsible for the strike. The absence of a formal strike vote is not decisive on the question of a union's involvement in a strike action. * * * However, it is well established that a union is responsible for the mass action of its rank and file so long as it is a functioning entity." (496 F.2d 956).

In *Vulcan Materials, supra,* which involved a secondary boycott claim pursuant to 29 U.S.C. 187, where the standard of proof is the same as that under 29 U.S.C. 185, the court held the union responsible on the mass action theory because at no time during the strike did any of the Vulcan employees report for work. The court said:

> "There can be no question but that the Unions engaged in a strike against Vulcan; at no time during the Unions' strike against Forman did a Vulcan employee report for work. It is well established that as long as a union is functioning as a union, it must be held responsible for the mass action of its members. * * *" (430 F.2d 455)

As a matter of labor policy, the mass action theory of liability is essential to the promotion of industrial peace and stability by encouraging local unions to follow the grievance and arbitration provisions of a labor agreement, rather than to strike. Furthermore, it compels them to obey temporaray restraining orders and preliminary injunctions after they are issued. In this case, the unions were in civil contempt from June 7, 1972, when they were served, until after the hearing on the preliminary injunction on June 20, 1972. To refuse to hold them liable when they had knowledge of the injunction and attended union meetings where the disputes were discussed, is to exonerate Local Unions for violation of court orders, even though they are acting as a Union in violation of a court order and their obligation not to strike.

Mass action is union action and the court's decision is in conflict with the Third, Fifth and Eighth Circuits.

2. **The Decision of the Court Below That a Union May Only Be Held Responsible for the Authorized or Ratified Actions of Its Officers and Agents Conflicts With a Decision of the United States Supreme Court and Decisions of Other Courts of Appeal as to the Proper Interpretation of 29 U.S.C. 185, Which Hold That Liability of a Union Is Based on Ordinary Doctrines of Agency.**

In this case the Court of Appeals for the Sixth Circuit held that this "court has repeatedly recognized that a union may only



be held responsible for the authorized or ratified actions of its officers and agents." (543 F.2d 12)

Such statement applies the language of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106 to actions brought under Section 29 U.S.C. 185. It is in direct conflict with the decision of this court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966) which held that the strict proof provisions of Section 6 of the Norris-LaGuardia Act do not apply to actions under 29 U.S.C. 187.

In *Gibbs, supra*, the court held that the Union's liability was to be "measured by reference to ordinary doctrines of agency, rather than the more stringent standards of Section 6" (383 U.S. 736). Since 29 U.S.C. 187 adopts the procedural provisions of 29 U.S.C. 185, proof in the instant case is governed by ordinary principles of agency, rather than the strict provisions of Section 6 of the Norris-LaGuardia Act. This because 29 U.S.C. 185 provides that any labor organization shall be bound by the acts of its agents, and in determining whether a person is acting as an agent for another person "so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. 185(e).

Petitioner brought suit under 29 U.S.C. 185 for injunctive relief to enjoin a strike over an arbitrable issue (A 9, 42). When Respondents did not comply with the temporary restraining order, it sought to hold them in civil contempt (A 40-41).

Instead of applying the standard of proof required by 29 U.S.C. 185, the court below applied the standard of proof of 29 U.S.C. 106. Therefore, its decision is in direct conflict with the decision of this Court in *United Mine Workers v. Gibbs, supra*, and the decisions of the Third, Fifth and Eighth Circuits. *United States Steel Corporation v. International Union, United Mine Workers of America, et al.*, 534 F.2d 1063 (3rd Cir.

1976); *Eazor Express, Inc. v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.*, 520 F.2d 951 (3rd Cir. 1975), cert. denied 424 U.S. 935, *Vulcan Materials Company v. United Steelworkers of America, et al.*, 430 F.2d 446 (5th Cir. 1970) and *Wagner Electric Corporation v. Local 1104, International Union of Electrical, Radio and Machine Workers*, 496 F.2d 954 (8th Cir. 1974).

The Third Circuit in *Eazor Express, supra*, held that a union could be found responsible for a work stoppage based on the ordinary rules of agency in the following language:

> "* * * [T]he courts have also based union liability for the resulting damage to the employer on the common law of agency, expressly made available to the parties to a breach of contract suit by § 301 (b) and (e) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185 (b) and (e) * * * That a principal may ratify, by subsequent conduct inconsistent with repudiation, an agent's unauthorized acts earlier disaffirmed by the principal may well also be a theory of liability which might be applied under the facts of this case in order to implement federal labor policy * * *." (520 F.2d at 963-964)

See also, *United States Steel Corporation, supra*, 534 F.2d at 1074.

In *Vulcan, supra*, the Fifth Circuit in holding an International and Local Union liable under 29 U.S.C. 187 said:

> "* * * [T]he acts of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified * * *" (430 F.2d at 457).

In *Wagner, supra*, the Eighth Circuit stated the rule thus:



> "* * * A union is responsible for the actions of its officers and members according to the ordinary doctrines of agency * * *" (496 F.2d at 956).

Thus, only the Sixth Circuit, which followed Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106, holds that a union must authorize or ratify acts of its agents, in order to be held responsible with respect to injunctive relief, damages or contempt. Such decision is in conflict with the decision of the United States Supreme Court in *Gibbs, supra*, and with the various decisions of the Courts of Appeals.

On June 7, 1972, after issuance of the temporary restraining order (A 28-31), LeRoy Patterson, the President of District 23, the Local Presidents and most of the Locals' Mine Committees met with Peabody in an effort to settle the dispute (A 279-281). However, the Unions refused to follow the findings of the Federal Bureau of Mines, or to further grieve the matter. Instead, they insisted that Peabody continue to use First Class Miners to walk the belts (A 280-281).

LeRoy Patterson was the spokesman and he conveyed the Peabody position to the men at Local meetings and discussed the dispute with them. He told them of the court's order, requiring them to return to work, but the men did not return (A 316-319).

Patterson was a union agent for the purpose of handling the grievance (A 93) and had an obligation on behalf of the Locals, to follow the Settlement of Disputes procedure and to get the men to return to work. Instead, he tried to settle the grievance unilaterally outside the established procedure.

Under the ordinary principles of agency, the Local Union officers who instigate and participate in the strike, and who try to end the strike only by attempting to get Peabody to accede to their position, make the Local Unions liable for their refusal

to obey the injunction. The Local Union officers did not return to work or endeavor to lead the men back to work. Therefore, the decision of the court below conflicts with the decision of the United States Supreme Court, and the decisions of the Courts of Appeal heretofore cited.

3. **The Decision of the Court Below Is in Conflict With Other Federal Courts of Appeals in That It Did Not Require Affirmative Action on the Part of the Local Unions to End the Strike.**

The decision of the court below is in direct conflict with decisions of the Courts of Appeal for the Third, Fifth and Eighth Circuits. *United States Steel Corporation v. United Mine Workers of America, et al.*, 534 F.2d 1063 (3rd Cir. 1976); *Eazor Express, Inc. v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.*, 520 F.2d 951 (3rd Cir. 1975), cert. denied 424 U.S. 935 (1976); *Vulcan Materials Company v. United Steelworkers of America, et al.*, 430 F.2d 466 (5th Cir. 1970), cert. denied 401 U.S. 963 (1971) and *Wagner Electric Corporation v. Local 1104, International Union of Electrical, Radio and Machine Workers*, 496 F.2d 954 (8th Cir. 1974).

The court below relied on the "prohibitory wording" of the temporary restraining order, including that the "* * * order did not require any affirmative action on the part of the Local Unions or District 23 aimed at getting the membership back to work." (543 F.2d 12) Such conclusion is totally erroneous in that to be "restrained and enjoined" from striking cannot be construed to allow the Local Unions to maintain the status quo. To comply with such order, the unions had responsibility to endeavor to return the men to work, or the order is rendered meaningless. By failing to take action which could reasonably be expected to return the men to work, the unions acquiesced in and condoned the illegal activity. *Vulcan, supra.* Merely urging the



men to work is not sufficient to escape liability, as the court below suggested. *Vulcan, supra.*

*United States Steel Corporation, supra,* is directly in point. In that case the plaintiff was seeking a preliminary injunction. In holding that plaintiff was entitled to a preliminary injunction the court held that the contract obligated the union to use reasonable efforts to get the men back to work. The contractual provisions in that case and the one in this case were virtually identical. Both contracts required the parties to:

> "Maintain the integrity of the contract, and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Disputes' Article." (A 654)

The Court of Appeals for the Third Circuit held that the unions had an obligation to use reasonable efforts to end the strike. It said:

> "* * * From *Lucas Flour* we know that a no-strike undertaking will be implied from a grievance and arbitration clause, a covenant to maintain the integrity of the contract necessarily embraces a reasonable efforts obligation to comply with the no-strike promise." (534 F.2d 1073)

If such obligation exists by contract before a preliminary injunction or temporary restraining order is issued, then it clearly exists after such order is issued, and the Local Unions were obligated to take affirmative action to get the men back to work.

In *Wagner Electric Corporation, supra,* the rule was stated thus:

> "* * * A union is required to use its best efforts to return striking employees to their jobs, if it is not to be held responsible for its actions." (496 F.2d 956)

When a union is required to use "best" or "reasonable" efforts to end a strike, the same obligation exists with respect to complying with a temporary restraining order. In fact, it even exists on a stronger basis because the court has acted.

Accordingly, the decision of the court below conflicts with that of the Third, Fifth and Eighth Circuits in that the holding of the court that the Local Unions need not take affirmative steps to return the men to work is in direct conflict with those decisions.

## CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinions of the Court of Appeals for the Sixth Circuit.

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# APPENDIX

## APPENDIX A

**Peabody Coal Company,**
**Plaintiff-Appellee,**

**v.**

**Local Unions 1734, 1508, 1548, and District No. 23,**
**United Mine Workers of America,**
**Defendants-Appellants.**

No. 75-2136

United States Court of Appeals
Sixth Circuit

Argued March 29, 1976

Decided Oct. 19, 1976

* * * * * * *

Before EDWARDS, PECK and MILLER*, Circuit Judges.

JOHN W. PECK, Circuit Judge.

This is an appeal from an order of the district court, finding the defendants-appellants guilty of being in civil contempt of a June 6, 1972 temporary restraining order. This contempt order fined the Local Unions 1734, 1508 and 1548 of the United Mine Workers of America a total of $6,500 each, and District 23 of the Union $13,000, all payable to Peabody Coal Company.

The case arose out of a series of work stoppages in June, 1972 at three of Peabody's Western Kentucky mines, Star, Ken and

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* Honorable William E. Miller died April 12, 1976, and did not participate in the decision of this case.

River Queen. In all three mines, miners are members of the United Mine Workers of America, and Peabody and the UMWA, all its Locals and Districts, were parties to the National Bituminous Coal Wage Agreement of 1971. These work stoppages involved disputes at each of the mines concerning the inspection of the conveyor belts which carry the coal out of the mines. The Union wanted the Company to post the belt examiner jobs for union members holding First Class Certificates. Peabody brought suit in the district court charging that the Unions were in violation of the collective bargaining agreement which required them to submit such disputes to arbitration, and in response the district court, on June 6, 1972, issued a temporary restraining order, ordering:

> "1. The defendants, and each of them, shall submit their disputes and disagreements referred to in the complaint to the grievance procedure and arbitrate the said dispute in accordance with the grievance procedure as stated in the collective bargaining agreement between the parties, and
>
> "2. The defendants, and each of them, and their respective members, officers, agents, servants, and employees . . . are enjoined and restrained from:
>
> (a) Engaging in strikes, work stoppages or concerted refusals to work at plaintiff's Star, Ken, and River Queen Underground Mines . . . over the disputes . . . involving job classifications, certifications, and applicable contract rates of pay for persons who inspect and examine coal-conveying belts . . .
>
> (b) Violating or continuing to violate the contract by refusing to submit to the grievance procedure . . . and
>
> (c) Inducing, instructing, persuading, or encouraging plaintiff's employees at plaintiff's Star, Ken and River Queen Underground Mines to engage in a strike, work stoppage or other economic activity against plaintiff . . . ."



On June 14, 1972, after a brief hearing during which no evidence was taken, the district court found the Locals and District 23 to be in contempt of the June 6 temporary restraining order. On June 20 and 21 the district court held a preliminary injunction hearing, at the close of which the district court issued its injunction and found "each of the defendants still to be in contempt of this Court." On appeal, this court vacated the contempt order, reversed judgment on the ground that the Unions were denied an evidentiary hearing and remanded the case for further proceedings. *Peabody v. Local Unions Nos. 1734, 1508, and 1548 and District 23, United Mine Workers of America*, 484 F.2d 78 (6th Cir. 1973).

On remand, all parties were afforded an opportunity to offer additional evidence, but instead stipulated that the district court should decide the case based on the briefs of the parties and the evidence received at the preliminary injunction hearing. The district court entered its decision on May 16, 1975, reaffirming the finding of contempt and reimposing the fines.

Peabody argued below, and the district court apparently agreed, that because the Union members did not go back to work after the June 6 order was issued, the Unions should be held in contempt. The district court stated that "a union that is functioning, asserting its power and right to act as the bargaining agent, must be held responsible for the mass action of its members," because "[m]en just do not act collectively without leadership." We reject the district court's holding in this regard as not in accordance with the established law of this circuit.

[1, 2] This court has repeatedly recognized that a union may only be held responsible for the authorized or ratified actions

of its officers and agents. *North American Coal Corp. v. Local Union 2262, United Mine Workers of America*, 497 F.2d 459, 466-67 (6th Cir. 1974); and see, *Blue Diamond Coal Co. v. UMWA*, 436 F.2d 551 (6th Cir. 1970), *cert. denied*, 402 U.S. 930, 91 S.Ct. 1525, 28 L.Ed.2d 863 (1971); *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), *aff'd by an equally divided Court*, 361 U.S. 459, 80 S.Ct. 489, 4 L.Ed.2d 442 (1960); *Garmeada Coal Co. v. International Union U.M.W.A.*, 230 F.2d 945 (6th Cir. 1956). "In each of these cases this court recognized that where a union did not call, authorize, or encourage a strike, and, on the contrary, employed its authority to oppose it, no liability for an unauthorized or wildcat strike could be attributed to the union." *North American Coal Corp., supra*, at 467. There is no precedent in this circuit to support the contention that the "mass action" of union members is, in and of itself, sufficient to bind the Union. Moreover, the very terms of the June 6 order did not require any affirmative action on the part of the Local Unions or District 23 aimed at getting the membership back to work. The wording of the temporary restraining order in this regard was prohibitory in nature, and from this we decline to infer a requirement that the Unions use their "best efforts" to end the work stoppages. However, the fact is that evidence at the preliminary injunction hearing indicates that the Unions went beyond the requirements of the temporary restraining order in urging the membership to return to work. The district judge made no finding that the Unions or their officers induced, persuaded or encouraged the work stoppages in violation of the prohibitions of the temporary restraining order.

Peabody also maintains that the Unions were in violation of the temporary restraining order by virtue of their failure to submit the dispute to arbitration. The Unions' position in the district court was that the court could not require them to submit their grievances to arbitration since a safety dispute was at issue. However, the recent decision of the Supreme Court in *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368,



94 S.Ct. 629, 38 L.Ed.2d 583 (1974), holding that the mandatory grievance procedure of the National Bituminous Coal Wage Agreement was applicable to "safety disputes," has settled that issue adversely to the Unions and they do not argue it on appeal. The Unions do submit that the district court found them to be in contempt of the temporary restraining order only by virtue of the continuing work stoppages, and not because of their failure to arbitrate. We do not agree that the district court's decision can be so limited.

It is clear that the June 6 order required the Unions to submit the dispute regarding belt examiners to "the grievance procedure and arbitrate the said dispute." As the district court found, "The work stoppages were over grievances which the parties were contractually bound to arbitrate. Peabody was entitled to the temporary restraining order and the Union was required to obey it on pain of contempt." The uncontroverted evidence was that the matter was not submitted to arbitration.

[3] At the time of the June 6 order, the contract grievance procedure at the Star and Ken mines had reached the "third step," which required District 23 to handle the matter from that point on. At the River Queen mine there had been no formal grievance filed with respect to the belt examiner jobs prior to the strike which occurred there on June 3, 1972. The district court found that "when the strike occurred [at River Queen], the superintendent was told by members of the mine committee and the Local president that . . . District 23 had 'called the shots' up to that time, and they would just let the District continue to do so." The evidence at the preliminary injunction hearing also indicated that subsequent to the issuance of the temporary restraining order, it was District 23 which was negotiating with the Company regarding settlement of the dispute. We conclude that the record clearly shows a failure by District 23 to submit the dispute to arbitration, and thus that District 23 was properly found to be in contempt of the June 6 order. However, we also

conclude that the record does not support a finding that the Locals failed to arbitrate in accordance with the June 6 order, since the matter was virtually out of their hands.

[4] As to the appellants' contentions regarding the amount of the fines imposed by the district court, we note that Peabody pleaded and proved damages exceeding $400,000, and that the district court did not establish the fines on a per day basis, but rather fined District 23 a flat sum, $13,000. We cannot hold the district court's imposition of this fine to be in error.

Therefore, the judgment of the district court as to District 23 is affirmed, and as to Local Unions Nos. 1734, 1508, and 1548 is reversed.

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## APPENDIX B

In the United States District Court for the Western District of Kentucky at Owensboro

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|---|---|
| Peabody Coal Company, Plaintiff, v. Local Unions No. 1734, 1508 and 1548, United Mine Workers of America, and District 23, United Mine Workers of America, Defendants. | Civil Action No. 2660-O |

### MEMORANDUM AND ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit for further proceedings on plaintiff's motion to hold the defendants in contempt for failure to obey the Court's temporary restraining order issued June 6, 1972. The plaintiff is Peabody Coal Company, hereinafter referred to as Peabody. The defendants are Local Unions Nos. 1734, 1508 and 1548, and District 23, United Mine Workers of America, hereinafter collectively referred to as Union and separately referred to as District and by Local Number.

Miners struck Peabody's three underground mines in Western Kentucky known as Star, Ken and River Queen in June, 1972. In all three of these mines the miners are members of the United Mine Workers of America (UMWA). At that point in time, Peabody and UMWA, all of its districts and locals, were parties to the National Bituminous Coal Wage Agreement

of 1971 which contained grievance procedures for the settlement of both economic and safety disputes. At Star Mine the employees are members of Local No. 1734; at Ken Mine, Local No. 1548; and at River Queen, Local No. 1508. All three locals are within District 23, UMWA.

In the spring of 1972 a dispute arose at each of the three mines concerning the "examination" of conveyor belts which carry the coal from the working face to the outside. The Union wanted the company to post the belt examiner jobs for union members holding first class certificates and to pay applicable hourly rates.

At Star Mine where a strike occurred on June 1, 1972, the contract grievance procedure had progressed by May 13, 1972, to the third step. In essence, the Union was complaining because company men (non-union) were inspecting the belts. The Union contended that the jobs should be posted for union men. The company and the Union entered into an agreement at Star Mine on May 20, 1972, that the grievance would be held in abeyance, and that the company would use union "certified" men until a decision was made by the Federal Bureau of Mines as to the qualifications for belt examiners. Either company or union men may be "certified" and recognized by the state and federal government as highly qualified. Such classification includes persons who have been certified as mine foreman, assistant mine foreman, mine superintendent, pre-shift examiner or mine examiner by the state in which the mine is located.

A similar dispute had arisen at Ken Mine and had reached the third stage of the grievance procedure by April 25, 1972. The aggrieved parties were four union members who were "belt walkers" and who wanted to be paid a higher rate of pay, the rate for "fire bosses". On May 30, 1972, the company and the Union agreed to hold this grievance in abeyance pending the outcome of the Federal Bureau of Mines' and the Kentucky Department of Mines and Minerals' attempts to agree on qualifications for belt examiners and further agreed to use only union certified men to examine the belts in the interim. A strike, however, occurred at Ken Mine on June 2, 1972. At that time, Peabody was adhering to its agreement with the Union.



At River Queen Mine, there had been no formal grievance filed with respect to belt examiners prior to the strike which occurred there on June 3, 1972. At that time, Peabody had state certified belt walkers cleaning and walking the belts, as well as first class certified company personnel examining the belts. When the strike occurred, the superintendent was told by members of the mine committee and the Local president that the Local was not even having a called meeting about the strike because District 23 had "called the shots" up to that time, and they would just let the District continue so to do.

On the date of the strike at each mine, the men Peabody was using to examine the belts met the requirements of both state and federal regulations.

The strikes were in breach of the collective bargaining agreement which contains a grievance procedure from which there is implied a "no strike" covenant. On June 5, 1972, under *Boys Market, Inc. v. Retail Clerk's Union* (1970), 398 U.S. 235, 90 S.Ct. 1538, 26 L.Ed.2d 199, Peabody filed a complaint. A temporary restraining order was signed and entered by Honorable Rhodes Bratcher, a judge of this court, on June 6, 1972, ordering the striking miners to return to work at the three mines. The order was promptly served, and the officers of the District, Locals and International urged the miners to return to work. The miners refused to do so and the strike spread to include Peabody's open pit operations which had no problem with underground conveyor belts.

On June 14, 1972, Judge Bratcher held the District and Locals in contempt for failure to respect the temporary restrain-

ing order, and he assessed civil contempt fines against them to accrue on a daily basis.[1] He confirmed his findings of contempt after an evidentiary hearing on June 20-21, 1972. Judgment for fines in the amount of $13,000 was entered against the District and $6,500 against each Local.

On appeal to the United States Court of Appeals for the Sixth Circuit the contempt order was vacated for failure to give the Union a hearing before finding them in contempt, and the case was remanded for further proceedings, *Peabody v. Local Unions Nos. 1734, 1508 and 1548, and District 23, United Mine Workers of America* (6th Cir. 1973), 484 F.2d 78.

Even though the purpose of the remand was to afford the defendants their due process hearing, the Union declined the opportunity provided by the appellate court and did not offer any additional evidence for this Court's consideration on the issue. The parties stipulated that the transcript of evidence taken on June 20-21, 1972, should be considered by this Court as offered by the respective parties, and no other or additional evidence was offered prior to submission for our decision and judgment as expressed by this order.

There were three issues in this case: (1) Was the matter of civil contempt moot since the defendants were no longer in disobedience of a court order? (2) If not, were the defendants guilty of contempt for failing to obey the temporary restraining order issued on June 6, 1972? (3) Was the miners' refusal to

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[1] A method of picketing used by the UMWA when they are on strike is to simply have union members stand or sit in vehicles at mine entrances without sign, placard or statement resulting in UMWA members not working at that mine On June 16 as a result of this type picketing every one of Peabody's mines in Western Kentucky was on strike, including its strip mines where belt examining is not involved In *U S v. International Union, UMW of A.* (D.C. 1948) 77 F.Supp. 563, 177 F.2d 29, the Court said ". . . If a nod or a wink or a code was used in place of the word 'strike', there was just as much a strike as if the word 'strike' had been used . . . ."



work protected by 29 U.S.C.A. §143 because of abnormally dangerous conditions for work at the mines?

Defendants cite *United States v. International Union, etc.* (D.C. Cir. 1951), 190 F.2d 865 for their proposition that the issue is moot, but the facts of our present case make it distinguishable from the cited case. In *United States v. International Union, etc.*, supra, the government had brought the suit and had neither pleaded nor proven damages. Therefore, when the contumacious conduct was stopped, the question of civil contempt became moot, but in our instant matter Peabody pleaded and proved damages caused by the defendants' disobedience of the order. The proof indicated damages exceeding $400,000 accrued before the miners returned to work on June 22, 1972. Since civil contempt has two objectives: to coerce the defendant to obey the decree in the future and to compensate the plaintiff for the loss sustained by the defendants' disobedience,[2] the second objective remained to be accomplished, and the matter is not moot.

The second and third issues must be treated together. There is no question that the defendants did not obey the Court's temporary restraining order. It ordered the miners to return to work in the mines, and they did not do so. Their only defense to contempt therefor was to show that they could not obey the order. Although on June 14, 1972, the defendants stipulated that the order had been providently granted and should remain in effect until a hearing could be had on a preliminary injunction, they claimed they could not comply with the order because the individual members of the Union refused to return to work for safety reasons, asserting that an abnormally dangerous condition existed in the mines relative to the examination of belts, and cited 29 U.S.C.A. § 143, which provides:

> ". . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous

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[2] *United States v. United Mine Workers* (1947), 330 US. 258, 67 S.Ct. 677, 91 L. Ed. 884.

conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter."

A Union that is functioning, asserting its power and right to act as the bargaining agent, must be held responsible for the mass action of its members. Men just do not act collectively without leadership. The courts have time and time again recognized these principles and applied them in labor cases. *Teamsters v. Hum Ko Co.* (6th Cir. 1961), 42 L.C. par. 16,780; *Bethlehem Mines Corp. v. UMW of A* (Pa. 1972), 340 F. Supp. 829. In this case the District and the Locals were functioning in the matter in issue long before the strikes began and continuing right on through the period of contempt. The District president and counsel for the Union were in the courtroom when the temporary restraining order was signed, and received a copy thereof, and were apprised of its requirements. The Union never moved to dissolve or modify the temporary restraining order. The strikes continued, the Union did nothing to purge itself of contempt. No effort was made to invoke or threaten to invoke the sanctions authorized by the Union's constitution against any of its striking miner members.

The National Bituminous Coal Wage Agreement of 1971 under which the parties were operating set forth a procedure to be followed if the Union's Mine Health & Safety Committee really believes that conditions in the mines would endanger the lives or bodies of the miners and authorized the committee to cause removal of the miners from any area where imminent danger existed. Likewise, the contract further established a grievance procedure for the settlement of safety disputes which was mandatory.[3] None of these contractual rights were invoked by the defendants before or during the 17-day strike.

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[3] The existence of a mandatory grievance procedure for the settlement of safety disputes implied a "no strike" obligation over such issues, *Gateway Coal Co. v. United Mine Workers of America* 1974), . . .



Whether the employees' refusal to work is protected by 29 U.S.C.A. § 143, supra, depends upon ascertainable, objective evidence, that an abnormally dangerous condition existed, and no credible evidence of such danger was ever introduced. On the contrary, we find that the underlying issue was economics, not safety, and, accordingly, the defendants cannot excuse their disobedience by claiming that the miners believed that a dangerous condition existed in the absence of objective evidence to support that belief, *Gateway Coal Co. v. United Mine Workers of America* (1974), 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed. 2d 583.

The Federal Bureau of Mines did not believe that the problem created a situation of "imminent danger". In April, 1972, several weeks before these strikes a similar issue was before the Federal Bureau which had cited Peabody for having uncertified persons walking the belts, and at that time the Bureau stated that the conditions did not create an "imminent danger" and allowed the mine to continue operating. The Bureau found Peabody in compliance before the strike occurred in June, 1972.

The disputes between the Union and Peabody, which resulted in the strikes at Star, Ken and River Queen Mines were over posting jobs, job classifications, state certifications and applicable contract rates for the performance of certain work.

When the strike occurred at the three mines on June 1, 2 and 3, 1972, the belts were being examined by state certified belt examiners and certified union or company men. Peabody was not in violation of any provisions of the Coal Mine Health & Safety Act of 1969 regarding inspection and examination of coal conveying belts, and there were no abnormally dangerous conditions of work at any of the mines. The work stoppages were over grievances which the parties were contractually bound to arbitrate. Peabody was entitled to the temporary restraining order and the Union was required to obey it on pain of contempt for disobedience.

It is the opinion of this Court that each of the defendants is guilty of contempt for disobeying the temporary restraining order. Since the defendants were warned by District Judge Bratcher on June 14, 1972, what the price tag would bear for the disobedience, a civil contempt fine in like amounts to partially compensate the plaintiff for its loss is, in the opinion of this Court, reasonable under the circumstances. Therefore, civil contempt fines, to be paid to the plaintiff, as compensation are hereby imposed against District 23 in the amount of $13,000 and against each Local in the amount of $6,500, and judgment will be entered accordingly.

May 13, 1975

JAMES F. GORDON
United States District Judge

Copies to:

Counsel of record.

Supreme Court, U. S.
FILED
FEB 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-974

PEABODY COAL COMPANY,

*Petitioner,*

v.

LOCAL UNIONS NOS. 1734, 1508 AND 1548, UNITED MINE WORKERS OF AMERICA, AND DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## BRIEF IN OPPOSITION

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# INDEX


*Page*

OPINIONS BELOW ..... 1

QUESTIONS PRESENTED ..... 2

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 5

I. THE COURT OF APPEALS DECISION IS CLEARLY CORRECT ..... 5

II. THERE IS NO CONFLICT OF DECISION ..... 8

CONCLUSION ..... 12


## TABLE OF AUTHORITIES CITED

### Cases


*Belknap* v. *Leary*, 427 F.2d 406 (CA 2, 1970) ..... 7

*Bethlehem Mines Corp.* v. *UMWA*, 340 F.Supp. 829 (W.D. Pa. 1972) ..... 4

*California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885) ..... 6

*Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) .... 7

*Eazor Express, Inc.* v. *Teamsters*, 520 F.2d 951 (CA 3, 1975) ... 11

*Hart Schaffner & Marx* v. *Alexander's*, 341 F.2d 101 (CA 2, 1965) ..... 6

*IBEW Local 760 (Roane Anderson Co.)*, 82 NLRB 696 (1949) 6

*International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) ..... 7

*Page*

*Kansas City Power & Light Co.* v. *NLRB,* 137 F.2d 77 (CA 8, 1943) ..... 6

*Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939) ..... 7

*Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346 (CA 6, 1958), *aff'd equally divided,* 361 U.S. 469 (1960) ..... 8

*New York Telephone Co.* v. *CWA,* 445 F.2d 39 (CA 2, 1971) .. 7

*NLRB* v. *Heck's Inc.,* 388 F.2d 668 (CA 4, 1967) ..... 7

*North American Coal Corp.* v. *UMWA Local 2262,* 497 F.2d 459 (CA 6, 1974) ..... 10

*Penn Packing Co.* v. *Amalgamated Meat Cutters Local 195,* 497 F.2d 888 (CA 3, 1974) ..... 6, 10

*Schauffler* v. *Longshoremen's Local 1291,* 292 F.2d 182 (CA 3, 1961) ..... 6

*Schmidt* v. *Lessard,* 414 U.S. 473 (1974) ..... 7

*Southeast Idaho Building Trades Council (Westinghouse Electric Co.),* 164 NLRB 773 (1967) ..... 6

*Teamsters* v. *Humko,* 287 F.2d 231 (CA 6, 1961) ..... 4

*Telling* v. *Bellows-Claude Neon Co.,* 77 F.2d 584 (CA 6), *cert. denied,* 296 U.S. 594 (1935) ..... 6

*UMWA* v. *Gibbs,* 383 U.S. 715 (1966) ..... 5, 10

*UMWA* v. *NLRB,* 257 F.2d 211 (CA DC, 1958) ..... 8

*UMWA District 6 (Consolidation Coal Co.),* 217 NLRB No. 88 (1974) ..... 6

*United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (CA 4), *cert. denied,* 350 U.S. 847 (1955) ..... 6, 10



*Page*

*United States* v. *UMWA,* 177 F.2d 29 (CA DC), *cert. denied,* 338 U.S. 871 (1949) ..... 6

*United States Steel Corp.* v. *UMWA,* 519 F.2d 1249 (CA 5, 1975), *reh. denied,* 526 F.2d 377 (1976) ..... 6, 9, 12

*United States Steel Corp.* v. *UMWA,* 534 F.2d 1063 (CA 3, 1976) ..... 10, 11

*Vulcan Materials Co.* v. *United Steelworkers,* 430 F.2d 446 (CA 5, 1970), *cert. denied,* 401 U.S. 963 (1971) ..... 9, 12

*Wagner Electric Corp.* v. *Local 1104, IUE,* 491 F.2d 954 (CA 8, 1974) ..... 10, 12

**Statutes**

*Norris La-Guardia Act,* 47 Stat. 70 Section 6, 29 U.S.C. § 106 .. 8

**Miscellaneous**

A. Cox, *Some Aspects of the Labor-Management Relations Act,* 1947, 61 Harv. L. Rev. 274 (1948) ..... 5

3 C. Wright & A. Miller, *Federal Practice & Procedure* 591 (1973) ..... 7

IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-974

PEABODY COAL COMPANY,

*Petitioner,*

v.

LOCAL UNIONS NOS. 1734, 1508 AND 1548, UNITED MINE WORKERS OF AMERICA, AND DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION

Respondent Locals 1734, 1508 and 1548 of the United Mine Workers of America (UMWA) hereby answer in opposition to the petition for a writ of certiorari.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 543 F.2d 10 and appears as Appendix A in the petition, while the opinion of the District Court for the Western District of Kentucky, which was not reported, appears as the peti-

tion's Appendix B. The District Court's opinion was issued on remand from a previous decision of the Court of Appeals which was reported at 484 F.2d 78 and is set out in the Court of Appeals appendix (CA) at 514-22. The District Court's original opinions, likewise unreported, are set out at CA 486-91 and 511-13.

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it followed ordinary principles of agency law and held that a union can only be held vicariously liable in civil contempt for the actions of its officers and agents within the scope of their authority.

2. Whether the Court of Appeals erred in holding that where an employer-drafted Boys Markets temporary restraining order only prohibits a union from engaging in and ordering its members to engage in a work stoppage, and does not order the union to take affirmative action designed to bring the stoppage to an end, the union cannot be held liable in civil contempt for failure to use its undefined "best efforts" to end the stoppage, even assuming *arguendo* that it failed to do so.

## STATEMENT OF THE CASE

On different days in early June of 1972, work stoppages erupted at three mines operated in western Kentucky by petitioner Peabody Coal Company (Peabody), over disputes subject to resolution through the grievance procedure in the collective bargaining agreement then in force there. The respondents herein (unions) are the local collective bargaining representatives of the employees at the three mines. Peabody later contended that the unions had initiated or ratified the stoppages, and advanced allegations like those at pages 6 to 8 of the petition (Pet.), but those allegations were disputed, and after a hearing the District Court merely



found that "miners" had stopped work and not that the unions had done so. (Pet. A7)

On June 6, 1972, acting on a complaint filed by Peabody, the District Court (Bratcher, J.) signed a temporary restraining order Peabody had presented to it which prohibited the unions, UMWA District 23, and the unions' "members officers, agents, servants, and employees" from "engaging in strikes, work stoppages, or concerted refusals to work" over the grievances in question, from "refusing to submit" the grievances "to the grievance procedure" for resolution, and from "inducing, instructing, persuading or encouraging" employees to stop work at the three mines. (CA 29-30) But despite the efforts of officers of the unions, UMWA District 23, and the UMWA International as well, who all personally urged the miners to return to work, they refused and stayed out. (Pet. A4, A9) Peabody then filed various contempt motions, but rather than asking the District Court to take action against the striking miners, Peabody instead asked only that the unions and District 23 be held in contempt. (CA 34-39, 151-54) Peabody never asked the District Court to take action against the striking miners.

On June 22, 1972, without a hearing, the District Court found the unions and District 23 in civil contempt, fining each of the unions $6,500, and District 23 $13,000. (CA 486-91, 511-13) The contempt judgments were set aside by the Court of Appeals for the Sixth Circuit on September 13, 1973 (484 F.2d 78), reentered after further consideration on remand (by Gordon, J.) on May 16, 1975 (Pet. A7-A14), and affirmed as to District 23 but vacated as to the locals on October 19, 1976, in the Court of Appeals decision Peabody challenges in part[1] here (Pet. A1-A6).

In its decision on remand, the District Court held that the unions were in contempt simply because they "ordered the

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[1] We presume Peabody is not seeking review of the affirmance of its judgment against District 23.

miners to return to work and they did not do so." (Pet. A3, A11) As the Court of Appeals noted, "[t]he district judge made no finding that the Unions or their officers induced, persuaded or encouraged the work stoppages in violation of the prohibitions of the temporary restraining order." (Pet. A4) The District Court asserted that a union complying with its statutory responsibility "to act as the bargaining agent, must be held responsible for the mass action of its members" because "[m]en just do not act collectively without leadership,"[2] and found that the unions and District "were functioning in the matter in issue long before the strikes began and continuing right on through the period of contempt."[3] (Pet. A12)

The Court of Appeals (per Peck, J.) reversed the contempt findings with respect to the unions, holding that "a union may only be held responsible for the authorized or ratified actions of its officers and agents." It added that the temporary restraining order had not ordered "any affirmative action on the part of the [unions] aimed at getting the membership back to work," and "from this" declined "to infer a requirement that the Unions use their 'best efforts' to end the work stoppages," or take any other sort of affirmative action. (Pet. A3-A4) The contempt finding with respect to District 23 was affirmed on alternative grounds not

[2] For this proposition the District Court relied upon *Bethlehem Mines Corp.* v. *UMWA,* 340 F.Supp. 829 (W.D. Pa. 1972), which had been vacated on appeal two years earlier, CA 3 No. 72-1466 (unreported) (June 19, 1973), and *Teamsters* v. *Humko Co.,* 287 F.2d 231, 241 (CA 6, 1961), where the Court of Appeals unsurprisingly concluded that there was "nothing 'wildcat' about a 400-mile [picketing] trip taken by a group of adults, with a union official in charge." Equally unsurprisingly, Peabody does not try to rely upon either of the decisions cited by the District Court in the petition.

[3] The unions had apparently been "functioning" because they had processed their members' grievances, and because they appeared in District Court after being summoned. (Pet. A12)



relied upon by the District Court in its decision. (Pet. A5-A6).

Peabody filed its petition for certiorari in this Court on January 13, 1977, without filing a petition for rehearing in the Court of Appeals, although Peabody now purports to believe (Pet. A13-A15) that the Court of Appeals' decision was contrary to one of its earlier decisions. District 23 has not sought further review.

## ARGUMENT

### I. THE COURT OF APPEALS DECISION IS CLEARLY CORRECT

1. The Court of Appeals obviously did not err in holding that a union can only be held vicariously responsible for actions of its officers and agents within the scope of their authority, for their "authorized actions," and in declining Peabody's invitation to create no-fault union liability for the unauthorized and unratified actions of union members. Unions are no more liable for the actions of the employees they are elected to represent than corporations are for the actions of the stockholders they represent, or members of Congress are for the actions of the constituents they are elected to represent. This Court has itself stressed that a union's responsibility for the actions of its members is to be measured "by normal rules of agency law" *UMWA* v. *Gibbs,* 383 U.S. 715, 736 (1966). As Professor Cox put it in his seminal article on the Taft-Hartley Act, "just as a corporation is not liable for the acts of a stockholder, so recognition of a labor organization as a juristic personality prevents imposing liability on it for the acts of its members." A. Cox, *Some Aspects of the Labor-Management Relations Act, 1947,* 61 Harv. L. Rev. 274, 310 (1948).

In line with *Gibbs,* the National Labor Relations Board has always held:

> "The very fact of mass quitting alone supplies persuasive evidence . . . that [a] cessation of work was the

> outcome of . . . concerted action aimed at a common objective. . . . That is not to say, however, that where the employees are organized, an inference is also justified that the strike or concerted action was authorized by their labor organization. *Union responsibility must be established by an independent showing.*

*IBEW Local 760 (Roane Anderson Co.),* 82 NLRB 696, 704 (1949) (emphasis added). *Accord, Southeast Idaho Building Trades Council (Westinghouse Electric Co.),* 164 NLRB 773, 779 (1967); *UMWA District 6 (Consolidation Coal Co.),* 217 NLRB No. 88, at 25 (1974). The Courts of Appeals agree:

> "The fact that [a] strike took place is not sufficient to raise the presumption that the union, as an entity separate from its members, is responsible. *No federal appellate court case has held unions to* [*such a*] *high standard of vicarious liability.*"

*United States Steel Corp.* v. *UMWA,* 519 F.2d 1249, 1253 (CA 5, 1975), *reh. denied,* 526 F.2d 377 (1976). *Accord, e.g., Penn Packing Co.* v. *Amalgamated Meat Cutters Local 195,* 497 F.2d 888, 890-91 (CA 3, 1974); *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 876-79 (CA 4), *cert. denied,* 350 U.S. 847 (1955); *United States* v. *UMWA,* 177 F.2d 29, 36 (CA DC), *cert. denied,* 338 U.S. 871 (1949).

This should particularly be so in civil contempt actions, where union responsibility, like all other elements of the alleged offense, must be proven by "clear and convincing" evidence. See *California Artificial Stone Paving Co.* v. *Molitor,* 113 U.S. 609, 618 (1885); *Hart Schaffner & Marx* v. *Alexander's,* 341 F.2d 101, 102 (CA 2, 1965); *Schauffler* v. *Longshoremen's Local 1291,* 292 F.2d 182, 188-89 (CA 3, 1961); *Telling* v. *Bellows-Claude Neon Co.,* 77 F.2d 584, 585 (CA 6), *cert. denied,* 296 U.S. 594 (1935); *Kansas City Power & Light Co.* v. *NLRB,* 137 F.2d 77, 79 (CA 8, 1943).



"[A] bare preponderance of the evidence will not suffice." 3 C. Wright & A. Miller, *Federal Practice & Procedure* 591 (1973).

2. Nor did the Court of Appeals err in refusing to "imply" an affirmative "best efforts" obligation into the merely prohibitory language of the temporary restraining order, and thus to convert it, after the fact, from a non-appealable "prohibitory" order to a "mandatory" order that would have been appealable.[4]

"Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive *explicit* notice of precisely what conduct is outlawed." *Schmidt* v. *Lessard,* 414 U.S. 473, 476 (1974) (emphasis added). The Court of Appeals had to either construe the temporary restraining order as containing only a prohibitory command in accordance with its explicit language, thus making any lack of affirmative action fully lawful in terms of contempt, or pronounce it too vague to be enforceable in contempt because of a complete lack of fair notice that a mandatory command was intended. Neither Due Process nor federal equity doctrine tolerate contempts based on decrees too vague to be understood, much less contempts based upon mandatory commands that never found their way from the minds of plaintiffs to operative judicial orders. See *International Longshoremen's Ass'n.* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 76 (1967); *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U.S. 385 (1926); *New York Telephone Co.* v. *CWA,* 445 F.2d 39, 48-49 (CA 2, 1971); *NLRB* v. *Heck's Inc.,* 388 F.2d 668 (CA 4, 1967).

Respondents would only add that implication of a "best efforts" obligation would have been particularly inappropriate here, where the bargaining history of the collective bargaining agreement the District Court's order was enforc-

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[4] *Belknap* v. *Leary,* 427 F.2d 406 (CA 2, 1970).

ing indicated that no "best efforts" obligation was to be implied into its provisions, so that an explicit "best efforts" requirement obviously could not properly have been included in the order. At one time (1950-52), the national coal agreement did contain a clause requiring the UMWA to use its "best efforts . . . to prevent stoppages of work by strike." But the UMWA was able to get that clause deleted, in return for bargaining table concessions to the coal operators on other questions, and did so as it had "proved unsatisfactory" to UMWA entities "because it laid them open to criticism for measures which they took, or did not take, in disciplining locals or members who engaged in unauthorized stoppages." *UMWA* v. *NLRB,* 257 F.2d 211, 216-17 (CA DC, 1958); see *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 350 & n. 5 (CA 6, 1958), *aff'd equally divided,* 361 U.S. 469 (1960). Similarly, indemnity clauses in former agreements, which made the union liable for unauthorized work stoppages, were eliminated in 1947 because of "the danger of suits for breach of contract" under the new Taft-Hartley Act. *Id.* The agreement in effect in June 1972 even went so far as to note the deletion of these provisions (CA 66), and to "expressly repeal" all provisions in district and local agreements creating "no strike, indemnity, or guarantee" obligations (CA 95). In short, Peabody is trying to have its cake and eat it too.

## II. THERE IS NO CONFLICT OF DECISION

1. Peabody alleges that the Court of Appeals declined to follow "ordinary standards of agency law" in determining whether the unions had been in contempt, and that it instead, in conflict with decisions of this Court and other Courts of Appeals, applied the stricter union liability test set out in § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (Pet. A18-A22). That allegation, however, is clearly incorrect as a factual matter. The decision says nothing about "clear proof" or limiting union responsibility to actions that



were "specifically authorized" or "specifically ratified" as under § 6; in reality, the Court of Appeals held that a union is responsible for *all* "authorized or ratified actions of its members" as under normal agency principles, and not merely those specifically authorized or ratified. (Pet. A3-A4) Section 6 was not even mentioned in the decision, let alone relied upon, and the unions never argued that § 6 applied, although they of course pointed out that as already noted in part I.1. *supra,* "clear and convincing evidence" is required in all civil contempt actions.

2. Nor have the Third, Fifth and Eighth Circuits, and the Sixth Circuit itself, gone beyond normal principles of agency law to hold that the unauthorized and unratified "mass action" of union members is, "in and of itself," sufficient to place a union in civil contempt. (Pet. 13-18) In fact, none of the Third, Fifth and Eighth Circuit decisions relied upon deal with civil contempt at all; they all deal with injunction and damage verdicts which need only be predicated upon a preponderance of evidence, not "clear and convincing evidence." Furthermore, as the Fifth Circuit has pointed out, in actuality "*no* federal appellate court case" has ever held that "the fact that [a] strike took place is . . . sufficient in itself to raise the presumption that [a] union, as an entity separate from its members, is responsible." *United States Steel Corp.* v. *UMWA,* 519 F.2d 1249, 1256 (CA 5, 1975), *reh. denied,* 526 F.2d 377, 378 (1976). With specific reference to the earlier Fifth Circuit decision Peabody relies upon, namely *Vulcan Materials Co.* v. *United Steelworkers,* 430 F.2d 446 (CA 5, 1970), *cert. denied,* 401 U.S. 963 (1971), the *U.S. Steel* Court observed that when *Vulcan* is "[r]ead in context it is clear that the [Vulcan] Court was *not* laying down a per se rule that a union is liable every time its members go on strike," and that the unions in *Vulcan* had "induced and encouraged the Vulcan employees to refuse to work." 519 F.2d at 1253 (emphasis added).

Similarly, in Peabody's most recent Third Circuit decision, *United States Steel Corp.* v. *UMWA,* 534 F.2d 1063, 1074 (CA 3, 1976) (emphasis added), that Court observed that "mass action" does not create "strict union liability" in any event, and was careful to say that since the only question before it was the propriety of a preliminary injunction, which it vacated, it had "no occasion . . . to consider the extent, *if any,* to which [union] members' actions may make [unions] liable in damages" or, obviously, in contempt. And in a recent damage case, the Third Circuit stated that "liability [will] not be imposed on a union for an unauthorized strike in the absence of specific [contractual] language so requiring." *Penn Packing Co.* v. *Amalgamated Meat Cutters Local 195,* 497 F.2d 888, 891 (CA 3, 1974).

As for Peabody's other citations, in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 873, 876-77 (CA 4), *cert. denied,* 350 U.S. 847 (1955), the Court observed that a local union would obviously have been liable in damages for a strike it had voted to ratify, if it had been sued. In *Wagner Electric Corp.* v. *Local 1104, IUE,* 491 F.2d 954, 956 (CA 8, 1974), a union was held liable for a strike in damages because of "the involvement of union officers and stewards in initiating the strike," and not merely because union members had struck. And in *North American Coal Corp.* v. *UMWA Local 2262,* 497 F.2d 459, 467 (CA 6, 1974), the Court only remanded a criminal contempt action for a hearing on whether a union had ratified an unauthorized work stoppage in a union meeting.[5]

The respondents would add that Peabody's "mass action" proposition—that unions should be held responsible for the unauthorized and unratified actions of their members in any dispute where they have "functioned"—is clearly contrary to federal labor policy as set out by this Court in *UMWA* v. *Gibbs,* 383 U.S. 715, 739 (1966). There this

[5] This Court does not grant certiorari to resolve intra-circuit conflicts anyway.



Court declared that unions should be encouraged to "exercise a restraining influence" in "explosive" situations, and therefore should not be made to risk liability for entering them. A union should be encouraged "to take up the dispute" so that it might be resolved more quickly and industrial relations may be more quickly normalized. In short, federal labor policy requires that a union be allowed to "function" in disputes between its members and their employers without incurring no-fault contempt or damage liability for doing so.

3. Finally, Peabody errs in implying that the Third, Fifth and Eighth Circuits have held that purely prohibitory anti-strike injunctions impliedly require unions to use their "best efforts" to end enjoined unauthorized strikes. (Pet. 22-24) As before, all of the decisions Peabody relies upon are damage and injunction decisions; none of them involve contempt, where liability is to be determined from the four corners of the decree allegedly violated, and must be predicated on "clear and convincing evidence." In fact, in the most recent Third Circuit decision cited, *United States Steel Corp.* v. *UMWA,* 534 F.2d 1063, 1078 (CA 3, 1976), that Court stated that even where an anti-strike injunction imposes a "best efforts" obligation, the decree is invalid for vagueness unless it also tells the union "the specific steps it must take." Thus in the Third Circuit, *a fortiori,* if a decree does not order that "best efforts" be made at all, it cannot be held to require them.

Furthermore, none of the cited Circuits have imposed even "best efforts" damage liability on facts like those here. In the other cited Third Circuit decision, *Eazor Express, Inc.* v. *Teamsters,* 520 F.2d 951, 960 (CA 3, 1975), that Court implied a "best efforts" obligation in a damage suit where the unions had bound themselves by an express no strike covenant, but indicated that it would not pyramid implications by finding such an implication in cases where, as here, a no strike obligation is itself implied from the ex-

istence of a grievance procedure. The Fifth Circuit has agreed. *United States Steel Corp.* v. *UMWA,* 519 F.2d 1249, 1252-53 (CA 5, 1975), *reh. denied,* 526 F.2d 377 (1976). And see Part II.2. *supra* with respect to the Fifth Circuit's earlier decision in *Vulcan, supra,* and the Eighth Circuit's decision in *Wagner Electric, supra.* (See also Part I.2. *supra* with respect to the express repudiation of any "best efforts" obligation in the collective bargaining agreement here.)

For the foregoing reasons, the respondents submit that the petition for a writ of certiorari should be denied.

## CONCLUSION

Respectfully submitted,

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